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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7
8 LAUSTEVEION JOHNSON,

9 Plaintiff,

10 } Case No. 2:13-cv-00110-JAD-GWF
11 vs. }
12 NDOC, et al., }
13 Defendants. }
14

**FINDINGS AND
RECOMMENDATIONS & ORDER**

Motion for Leave to Amend Complaint
(#39)

14 This matter comes before the Court on Plaintiff's Motion for Leave to Amend Complaint
15 (#39), filed on February 21, 2014. Defendants filed their Opposition (#43) on March 10, 2014.
16 Plaintiff filed his Reply (#48) on March 19, 2014.

17 Under Federal Rule of Civil Procedure 15(a)(2), a party may amend a complaint only with the
18 opposing party's written consent or with leave of the Court. Motions for leave to amend should be
19 freely given when justice so requires. *See Fed. R. Civ. P. 15(a)(2)*. A court may deny a motion to
20 amend, if there is a showing of undue delay or bad faith on the part of the moving party, undue
21 prejudice to the opposing party, or futility of the proposed amendments. *See Foman v. Davis*, 371
22 U.S. 178, 182 (1962). The party opposing amendment bears the burden of showing prejudice,
23 futility, or one of the other recognized reasons for denying a motion to amend. *See DCD Programs,
Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

25 Here, Plaintiff requests leave to file his second Amended Complaint. Defendants oppose
26 Plaintiff's Motion asserting that it is unclear and confusing as to how Plaintiff is attempting to amend
27 his complaint averring that Plaintiff failed to allege any new causes of action or describe the basis for
28 the additional defendants. *See Doc. # 43*. Defendants are also concerned that allowing Plaintiff to

1 add additional parties could be prejudicial with the extent of discovery already completed. *Id.*
 2 Plaintiff, however, purports that he is only adding an additional claim for retaliation and correcting
 3 the names of those Defendants already named based on information he received during discovery.
 4 *See Doc. # 48.*

5 Based on the Court's review, it appears Plaintiff's first Amended Complaint (#12) and second
 6 Amended Complaint (#39-1) are virtually identical. The only differences appear to be an additional
 7 claim of retaliation, deletion of the class action allegations, and corrected names for the two John
 8 Does and previously misnamed Defendants. Plaintiff also added the Nevada Department of
 9 Corrections ("NDOC") as a Defendant and terminated Defendant Miller.

10 Specifically, Plaintiff indicated that he is removing Defendant Miller for whom the Attorney
 11 General accepted service as Lloyd Millar. *See Dkt. #39, #48 at pg. 2.* Furthermore, Plaintiff
 12 provided the following updated information clarifying the identities of the Defendants already named
 13 in the action: Chaplain Kent Belmore (previously named as Buck), Senior C/O Daniel Brown
 14 (previously named as Brown), C/O Davis (previously named as Davis), C/O Jeremiah Hall
 15 (previously named as Hall), Kitchen Sgt. Paul Hunt (previously named as Hunns), Sgt. James Lester
 16 (previously named as John Doe Sgt.), C/O Paul Malay (previously named as P. Mayday), C/O
 17 Nakashima (previously named as John Doe C/O), and Senior C/O Robert Ramsey (previously named
 18 as Rowley).

19 The Attorney General has accepted service on behalf of Defendants Renee Baker, Daniel
 20 Brown, Ronald Bryant, Harold Byrne, James Greg Cox, Christopher Davis, Jeremiah Hall, Brea
 21 Howard, Paul Hunt, Charles Kirchen, Brandon Lawrence, James Lester, Rod Lightsey, Luis Lopez,
 22 Paul Malay, Lloyd Millar, William Moore, John Nakashima, Curtis Rigney, Walter Romero,
 23 Tasheena Sandoval, Andrew Silverstein, Drugh Waggener, and April Witter. *See Dkt. #71.* The
 24 Attorney General also filed the last known addresses under seal of Defendants Watson, Kennedy,
 25 Kent Belmore, and Robert Ramsey for service by the U.S. Marshals. *See Dkt. #52, #68.* Therefore,
 26 the proposed changes do not add additional parties that would prejudice the Defendants.

27 Furthermore, because Plaintiff's additional retaliation claim arises out of the same nexus of
 28 facts at issue in the first Amended Complaint (#12), the Court finds it will not prejudice Defendants

1 to allow Plaintiff to bring the additional claim of retaliation in his second Amended Complaint.
2 Finding the changes in Plaintiff's second Amended Complaint to be minor and necessary to ensure
3 the proper Defendants to the action are present, the Court will grant Plaintiff's Motion for Leave to
4 File an Amended Complaint (#39). The second Amended Complaint (#39-1) shall be filed and
5 screened pursuant to 28 U.S.C. § 1915A.

6 **I. Screening Pursuant to 28 U.S.C. § 1915A**

7 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks
8 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. §
9 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that
10 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief
11 from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro se*
12 pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696,
13 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
14 elements: (1) that a right secured by the Constitution or laws of the United States was violated, and
15 (2) that the alleged violation was committed by a person acting under color of state law. *See West v.*
16 *Atkins*, 487 U.S. 42, 48 (1988).

17 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
18 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of
19 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may
20 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
21 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is
22 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard
23 under § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court
24 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint
25 with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the
26 deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d. 1103, 1106 (9th
27 Cir. 1995).

28 . . .

1 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
 2 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
 3 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
 4 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In
 5 making this determination, the court takes as true all allegations of material fact stated in the
 6 complaint, and the court construes them in the light most favorable to the plaintiff. *See Warshaw v.*
 7 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less
 8 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard under Rule
 10 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels
 11 and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation
 12 of the elements of a cause of action is insufficient. *Id.*, *see Papasan v. Allain*, 478 U.S. 265, 286
 13 (1986).

14 A reviewing court should “begin by identifying pleadings [allegations] that, because they are
 15 no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556
 16 U.S. 662, 678-79, 129 S.Ct. 1937, 1950 (2009). “While legal conclusions can provide the framework
 17 of a complaint, they must be supported with factual allegations.” *Id.* “When there are well-pleaded
 18 factual allegations, a court should assume their veracity and then determine whether they plausibly
 19 give rise to an entitlement to relief. *Id.* “Determining whether a complaint states a plausible claim
 20 for relief [is] a context-specific task that requires the reviewing court to draw on its judicial
 21 experience and common sense.” *Id.*

22 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if
 23 the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on
 24 legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or
 25 claims of infringement of a legal interest which clearly does not exist), as well as claims based on
 26 fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S.
 27 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

28 . . .

1 **A. Screening of the Complaint**

2 Plaintiff raises the same claims from his first Amended Complaint (#12) related to prison
 3 officials' and staffs' interference with his religious exercise, particularly with his ability to observe
 4 his Muslim dietary restrictions. Similarly, he alleges the same allegations for retaliation,
 5 discrimination and cruel and unusual punishment because of his Muslim religion. The Court
 6 therefore incorporates the findings of Order (#11), which allowed Plaintiff to proceed with those
 7 claims. Additionally, the Court will screen Plaintiff's second Amended Complaint as to the addition
 8 of the Nevada Department of Corrections ("NDOC") as a Defendant and the additional claim of
 9 retaliation.

10 **1. Plaintiff's § 1983 Claim Against NDOC**

11 The requirements for relief under § 1983 have been articulated as: (1) a violation of rights
 12 protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a
 13 person (4) acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir.
 14 1991). A governmental agency that is an arm of the state is not a person for purposes of § 1983. *See*
 15 *Howlett v. Rose*, 496 U.S. 356, 365 (1990). Furthermore, a state's Department of Corrections is most
 16 likely an arm of the state under this analysis. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

17 Here, Plaintiff named NDOC, et al., as a Defendant in his second Amended Complaint (#39-
 18 1). Because NDOC is not considered a person for purposes of § 1983, Plaintiff cannot pursue this
 19 claim against NDOC. Plaintiff may, however, proceed with his claims against the remaining twenty-
 20 eight Defendants named in his second Amended Complaint.

21 **2. First Amendment - Retaliation**

22 Prisoners have a First Amendment right to file grievances against prison officials and to be
 23 free from retaliation for doing so. *Watison v. Carter*, 668 F.3d 1108, 1114 -1115 (9th Cir. 2012),
 24 citing *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). A retaliation claim has five elements.
 25 *Id.* First, the plaintiff must allege that the retaliated-against conduct is protected. The filing of an
 26 inmate grievance is protected conduct. *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005).
 27 Second, the plaintiff must claim the defendant took adverse action against the plaintiff. *Id.* at 567.
 28 "[T]he mere threat of harm can be an adverse action. . ." *Brodheim*, 584 F.3d at 1270. Third, the

1 plaintiff must allege a causal connection between the adverse action and the protected conduct.
 2 Allegation of a chronology of events from which retaliation can be inferred is sufficient to survive
 3 dismissal because direct evidence of a causal connection may be hard to obtain. *See Pratt*, 65 F.3d at
 4 808 (“timing can properly be considered as circumstantial evidence of retaliatory intent”); *Murphy v.*
 5 *Lane*, 833 F.2d 106, 108–09 (7th Cir. 1987).

6 The fourth element requires the plaintiff to allege that the “official’s acts would chill or
 7 silence a person of ordinary firmness from future First Amendment activities,” *Robinson*, 408 F.3d at
 8 568 (internal quotation marks and emphasis omitted), or allege that he suffered some other “more
 9 than minimal” harm. *Id.* at n.11; *Brodheim*, 584 F.3d at 1269. The claim is not defeated if the
 10 retaliatory conduct did not chill the plaintiff from suing the alleged retaliator. *Robinson*, at 569.

11 Finally, the plaintiff must allege “that the prison authorities’ retaliatory action did not advance
 12 legitimate goals of the correctional institution. . . .” *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir.
 13 1985). This element is successfully pled by alleging, in addition to a retaliatory motive, that the
 14 defendant’s actions were arbitrary and capricious, *id.*, or that they were “unnecessary to the
 15 maintenance of order in the institution,” *Franklin v. Murphy*, 745 F.2d 1221, 1230 (9th Cir. 1984).

16 In count III at page 6-A ¶ 20, Plaintiff alleges that Defendants, in retaliation for Plaintiff filing
 17 prisoner grievances regarding his First Amendment religious rights in keeping a proper Kosher/Halel
 18 diet and participating in Ramadan, wrongfully issued a NOC as an aggravating factor at Plaintiff’s
 19 parole hearing February 20, 2013. Plaintiff asserts that the NOC was later dismissed on appeal for
 20 being baseless, however, Plaintiff was already denied parole for three years because the NOC painted
 21 Plaintiff as litigious and racially and religiously motivated. Plaintiff has therefore stated a colorable
 22 claim against the named defendants.

23 II. Conclusion

24 The Court has screened the allegations contained in Plaintiff’s second amended civil rights
 25 complaint, taking into account Plaintiff’s pro se status, and has determined that Plaintiff’s claims pass
 26 the screening requirements of 28 U.S.C. § 1915(a). The motion to amend the complaint shall be
 27 granted and the matter shall proceed as to all claims raised therein. Plaintiff will not, however, be
 28 permitted to pursue his claim against the Nevada Department of Corrections. Accordingly,

IT IS HEREBY ORDERED that the motion to amend (ECF No. 39) is **granted**. The clerk shall detach and file the second amended complaint.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that Plaintiff's action against the Nevada Department of Corrections ("NDOC") be **dismissed** with prejudice.

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 1st day of July, 2014.

George Foley Jr.

GEORGE FOLEY, JR.
United States Magistrate Judge